

ILLINOIS POLLUTION CONTROL BOARD

February 11, 1976

ENVIRONMENTAL PROTECTION AGENCY,)

Complainant,)

v.)

CITY OF PEKIN,)

Respondent.)

EPA Region 5 Records Ctr.



303272

PCB 75-156

OPINION AND ORDER OF THE BOARD (by Mr. Zeitlin):

This matter is before the Board on an Enforcement Complaint filed April 14, 1975 by the Environmental Protection Agency (Agency), alleging that Respondent City of Pekin (Pekin) had operated a solid waste management site in Tazewell County, Illinois from July 27, 1974 until April 14, 1975 without the required operating permit from the Agency, in violation of Section 21(e) of the Environmental Protection Act (Act) and Rule 202(b)(1) of Ch. 7: Solid Waste of the Pollution Control Board Rules and Regulations. A hearing was held in the matter in Pekin, Illinois on November 21, 1975.

At that hearing the Attorney General submitted as an exhibit an unanswered Request for Admissions, going directly to the allegations contained in the Complaint (Compl. Ex. 1). The parties also submitted a Stipulation of Fact to which were attached various stipulated exhibits (Joint Ex. 1).

The City of Pekin, commencing in 1965, operated a solid waste management site on approximately 25 acres of leased property located 1-1/2 miles south of Pekin, in an unincorporated rural area. During its last year of operation, utilizing approximately 8 acres of the entire site, the site received approximately 29,491 tons of household waste, 2,158 tons of industrial waste, and 3,416 tons of miscellaneous waste, for a total of 34,065 tons of waste.

Between 1973 and 1975, the Agency sent Pekin 11 letters containing notification of the need for an operating permit at Pekin's solid waste management site (Stip. Ex. A-K). On April 24, 1974, Pekin filed an application for permit with the Agency, which was denied on May 9, 1974 (Stip. Ex. L). On April 2, 1975, Pekin again filed a permit application with the Agency; that application was denied by letter on April 25, 1975 (Stip. Ex. M).

EXHIBIT A

On June 2, 1975, the City of Pekin commenced a comprehensive study of its solid waste collection and disposal operations. As a result of that study, Pekin ceased dumping any material at the site in question as of November 12, 1975. Although the site had not been completely closed as of the date of hearing, (R.10), it was expected that all operations on the site, including dumping by others, would be eliminated within two to four weeks (R.86).

Although not stipulated to, the principal issue of fact in this case -- the lack of an operating permit -- was never an issue at the hearing in this matter. The unanswered Request for Admissions, submitted at the hearing without objection (R.5), is conclusive as to the fact that Pekin operated its solid waste management site during the period in question, and that it did so without the required permit.

Nor does the Board have any problem finding a violation based on that fact. Balancing the social and economic value of this unpermitted solid waste management site, and the potential for injury to the environment and public health, in light of the technical practicability and economic reasonableness of ceasing such unpermitted operation as demonstrated by Pekin's transfer of its operations to another site, we have no difficulty in finding such a violation.

The only real issue present under Section 33(c) of the Act, which we must examine in finding such a violation, is the suitability or unsuitability of this location for use as a solid waste management site. Although the City of Pekin did, on cross examination, question the Agency's determination as to the site's unsuitability (R.71), Pekin also stipulated to admission of the Agency's rejection letter regarding the April 2, 1975 permit application. The Agency there denied Pekin's application based on a June 18, 1974 preliminary hydrologic evaluation by the Illinois Geological Survey, showing that Pekin's site is located in an area where gravel constitutes the underlying soil to a depth of 75 feet, at which point bed rock began. In any event, because the site is no longer in operation, its present suitability for use as a solid waste management site is no longer a significant issue.

The only remaining question is that of the proper remedy in this situation. At hearing, the Attorney General closed with a request that a significant monetary penalty be assessed, and amended the prayer for relief in the Complaint to ask that the Board require that Pekin's site be finally closed, and covered, in compliance with a closure plan approved by the Agency. In light of Pekin's cessation of operations on the site after the Complaint was filed, and testimony presented at hearing by Pekin, that amendment was proper under our Procedural Rules.

The City of Pekin concentrated its case on the need for and expense of covering its site in conformity with Board regulations. To that end, it brought three witnesses: the Mayor, the City Engineer, and the Corporation Counsel. Pekin attempted to show that to cover the site with two feet of suitable material, as required under our regulations, and so as to optimize surface drainage and prevent surface water infiltration with consequence of leachate pollution of the water table or the Illinois River, would require approximately 132,000 cubic yards of fill, to be brought a distance of five or ten miles, at a completed cost of approximately \$6 per cubic yard (e.g., R.19). The Mayor of Pekin testified that the total cost of such cover on the site, amounting to \$792,000, when compared to Pekin's total 1974 tax levy of \$2,800,000, would present the city with an impossible burden (R.31). The Mayor feared that either city services would have to be cut, or the city's present tax rate of \$1.94 per \$100 assessed valuation (presently totaling \$147 million), would require a 50 cent increase (R.32).

The City's position in this regard was without foundation. Cross examination by the Attorney General showed that the City was unclear as to whether the entire site would need two feet of cover, or as to whether prior applications of daily or intermediate cover would apply as against the final cover requirements (e.g., R.26). And, although Pekin did question the source of the Agency's judgement, it is clear that there is a real danger of leachate pollution from this site.

We shall require that Pekin properly close and cover this site. The stipulated exhibits indicate that Pekin has known of the cover requirement for some years (Stip. Ex. A-K). Respondent stated that they had been covering the site since 1965, but that the cover was not that which would be permitted under our Rules (R.40). Nor, as the City claims, was the enactment of our regulations in 1973 a serious additional requirement in the area of site cover. In the areas of both subsurface soil composition and cover requirements, the Old Rules of the Department of Health contained requirements substantially similar to those of this Board. Illinois Department of Public Health, Division of Sanitary Engineering, Rules and Regulations for Refuse Disposal Sites and Facilities, April, 1966, Rules 4.02, 5.07.

Pekin seemed to assume at the hearing that its entire site would need two feet of cover, and that significant areas would need additional fill. The Attorney General showed that this was not necessarily true. We trust that in presenting a closing plan to the Agency, Pekin will minimize its own costs, with maximum effectiveness in protecting the environment.

Because the site in question has been closed, and this Order provides no shield from future enforcement regarding pollution which may result from this site, we will impose no penalty in this matter.

Apparently as a result of this enforcement case, Pekin has ceased using its unpermitted site, and has commenced using another private site at an increase in cost, and presumably in conformity with the Board's Regulations.

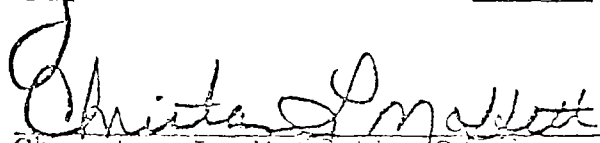
This Opinion constitutes the findings of fact and conclusions of law of the Board in this matter.

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that:

1. Respondent City of Pekin is found to have operated a solid waste management site in Tazewell County without the required permits from the Environmental Protection Agency, in violation of Section 21(e) of the Environmental Protection Act and Rule 202(b)(1) of Chapter 7: Solid Waste of the Pollution Control Board Rules and Regulations.
2. Respondent shall cease and desist all solid waste disposal activities on said site, and shall close said site in conformity with the Rules and Regulations of this Board, pursuant to a plan of closure prepared by Respondent and acceptable to the Environmental Protection Agency. Such plans shall be submitted to the Environmental Protection Agency within thirty (30) days of the date of this Order.
3. Respondent shall, if determined by the Agency, provide and maintain leachate monitoring sites; and shall report the results of such monitoring to the Agency on a quarterly calendar basis.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 11th day of February, 1976 by a vote of 4-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board



76-93

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on
the 1st Day of January in the year our Lord one thousand nine hun-
dred and seventy-seven, within and for the Third District of Illinois:

Present—

HONORABLE RICHARD STENGEL, Presiding Justice	X
HONORABLE ALLAN L. STODER, Justice	X
HONORABLE JAY J. ALLOY, Justice	
HONORABLE TOBIAS BARRY, Justice	X
HONORABLE ALBERT SCOTT, Justice	

JOSEPH FENNESSEY, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
April 6, 1977 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words and
figures following, viz:

EXHIBIT B

In The
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A. D. 1977

THE CITY OF PEKIN,)	Administrative Review of a final
)	order of the Illinois Pollution
Petitioner,)	Control Board.
)	
vs.)	
)	
THE ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

Publ. In Full

Mr. PRESIDING JUSTICE STENGEL delivered the opinion of the Court:

The City of Pekin has filed this administrative review action for review of an order entered by the Illinois Pollution Control Board in an enforcement proceeding involving the Pekin landfill site. This proceeding originated with a complaint filed by the Environmental Protection Agency charging that the City operated a solid waste management site without a permit as required by section 21(c) of the Environmental Protection Act (Ill. Rev. Stat. 1975, ch. 111-1/2, par. 1021(e)) and by Rule 202(b) (1) of the Board's Solid Waste Rules and Regulations.

In its complaint the Agency requested that the City be ordered to cease and desist the violations charged, that the City be ordered to discontinue refuse disposal activities at the site unless a permit is obtained, and that the City be assessed a penalty of \$10,000 for past violations plus \$1,000 per day for continuing violations.

In a stipulation of facts, the City admitted that it had been operating a 25-acre solid waste management site since 1965, that approximately eight acres were in use at the time the complaint was filed, and that two applications for a permit had been denied prior to the hearing. It was also stipulated that the City had stopped dumping refuse at the site about ten days before the hearing. The Agency placed

in evidence its request for an admission that the City had operated the site without a permit. The City did not answer the request, and under Rule 314(c) of the Board's Procedural Rules, the facts asserted in the request were admitted unless denied.

At the hearing, witnesses for the City testified that the only complaint that had ever been received relating to operation of the site concerned a one-time problem with windblown litter along the highway. The nearest water, other than surface water ponds at the site, was an intermittent stream 1/4 to 1/3 miles from the site that only flows during heavy rains. The site is located in a rural area, 1/4 to 1/2 mile from the nearest residence and occupies a deep gully that formerly was a gravel pit. The soil available at the site for use as cover is sandy loam.

Much of the testimony of the City's witnesses concerned the Agency's cover requirements for a closed solid waste management site. The City engineer testified that 132,000 cubic yards of cover material would be required to bring the entire 25-acre site up to grade with a two-foot cover of impervious material, such as clay soil. This estimate was based on a field survey, and took into account the present topography of the site plus the need for natural drainage. This same witness estimated that the total cost of closure would be \$792,000 (132,000 cubic yards at \$3.90 per cubic yard for material and \$2.10 per cubic yard for grading, leveling and seeding). On cross-examination, the witness admitted receiving another offer for cover material at \$3.00 per cubic yard, and also stated that hopefully the entire 25 acres would not require final cover, but only the part last in use. However, he said that the part already covered was not in conformity with present regulations.

The mayor of the City testified that the financial impact of a \$792,000 cost for closing would require a severe curtailment of municipal services or a tax increase of 50 cents per \$100 valuation. The

City's attorney testified about a meeting with Agency representatives at which time he was informed that the entire 25 acres must be brought up to grade and then a final cover of two feet of impermeable clay must be applied.

In rebuttal, the regional supervisor of land pollution control for the Agency, William C. Childs, testified that the Agency requires six inches of daily cover. Any area that is not to be used within 60 days must then have an additional six inches of cover to provide intermediate cover of one foot. An additional one foot is required to have a final cover of two feet.

The Agency witness also stated that no soil tests or tests of the water table have ever been made to determine what if anything is being polluted by the Pekin Landfill. Leachate (a highly polluted water) has been observed on the site but none was ever observed leaving the site. He also said that the City was denied a permit because of the potential for pollution. He testified that neither the Act nor Agency regulations require submission of a closure plan, but that it is Agency policy to request a closure plan documented with evidence of subsoil conditions, current grade, soil classification of site, provisions for monitoring, a map showing present cover, and the proposed grade showing drainage patterns and leachate collection.

During closing arguments, the Assistant Attorney General representing the Agency made an oral motion to amend the complaint to request that the City be ordered to submit a closure plan, citing Procedural Rule 328 which permits amendment of the pleadings to conform to the evidence. The City objected, and the Hearing Officer ruled that the motion to amend was not timely but that the Board would decide whether an amendment to the complaint was necessary to permit a closure order at this time. Procedural Rule 308 provides, in part:

"(f) The Hearing Officer shall rule upon all motions, except that he shall have no authority to dismiss or decide a proceeding on the merits, or for failure to state a claim, or for want of

jurisdiction, or to strike any claim or defense for insufficiency or want of proof. The Hearing Officer shall refer any such motion to the Board ***.

"(h) Rulings of the Hearing Officer may be reviewed by the Board after conclusion of the hearing, but will be set aside only to avoid material prejudice to the rights of a litigant."

After the hearing, the transcript was sent to the Board along with the Hearing Officer's statement that all witnesses appeared very credible and that credibility was not at issue.

The opinion and order of the Board included findings that the City operated its solid waste management site without the required permit and that the City therefore committed the violations charged. The Board stated that the prayer for relief in the complaint was amended and said:

"In light of Pekin's cessation of operations on the site after the Complaint was filed, and testimony presented at hearing by Pekin, that amendment was proper under our Procedural Rules."

The Board summarized the City's evidence as to the cost of final cover and concluded that the City's position was "without foundation." Cross-examination "showed that the City was unclear as to whether the entire site would need two feet of cover, or as to whether prior applications of daily or intermediate cover would apply as against the final cover requirements." The Board also found that there is a real danger of leachate pollution from the site. The Board decided that Pekin must properly close and cover the site, and said, "We trust that in presenting a closing plan to the Agency, Pekin will minimize its own costs ***." The Board then ordered the City to cease all solid waste disposal activities on the site and to close the site pursuant to a closure plan prepared by the City and acceptable to the Agency.

On review the City first contends that the Board's finding that there is a danger of leachate pollution at the site was against the manifest weight of the evidence, particularly in the absence of some actual evidence of pollution or of soil conditions. Included in the record is a letter sent to the City by the Agency denying its second application for an operating permit. That letter refers to a hydrologic evaluation by the Illinois Geological Survey in 1974 which found highly permeable gravel for a depth of 75 feet at the site, and concluded that "the leachate generated by wastes will migrate into the gravel aquifer and the proximate Illinois River."

Since the letter was in evidence before the Board, and since the City introduced no evidence to contradict the facts set out in the letter, we believe the finding that a danger of leachate pollution existed was supported by the record. See Tri-County Landfill Co. v. Illinois Pollution Control Bd. (2d Dist. 1976), 41 Ill. App. 3d 249, 353 N.E.2d 316.

Next, the City assigns as error the finding that two feet of final cover may not be necessary over the entire 25-acre site. The testimony of Childs supported the finding. However, we do not believe that finding was relevant to this permit violation proceeding. Instead, it would seem that any dispute as to what will constitute satisfactory final cover is a matter to be resolved either in a variance proceeding or in a separate proceeding to enforce the Board's closing regulations.

The City also argues that the Board failed to consider the economic reasonableness of its order to close the Pekin landfill. The City's argument presupposes that the cost of closing the site will be \$792,000. However, until such time as a closure plan is prepared, the quantity and cost of required cover material is speculative. Board regulations do not permit a refuse disposal site to remain open and uncovered when not in use. If the closure plan ultimately agreed to requires only one foot of additional cover in most areas, the cost will be much less than the City's estimate. The order of the Board which is before us does not set out specific closure requirements, and thus we

cannot say that the direction to close the site is economically unreasonable.

The most significant issue presented for review is whether the Board could properly require the City to submit a closure plan when the complaint did not request such action. The Board's opinion seems to assume that the Hearing Officer permitted an amendment to the complaint at the close of evidence and states that the amendment was proper. According to the record, the Hearing Officer refused to allow the amendment but said that the Board would decide whether a closure plan could be required under the complaint without amendment. Procedural Rule 308(h), set out above, permits the Board to set aside rulings of the Hearing Officer but only to avoid material prejudice to the rights of a litigant. Here the denial of the amendment did not materially prejudice the rights of either the City or the Agency. Consequently the Board could not properly reverse the ruling of the Hearing Officer and permit the amendment if in fact that is what was intended by the order.

Without the proposed amendment, the propriety of requiring the City to submit a closure plan becomes an issue. The Agency has cited no statute, rules, or regulations which place the burden of preparing a closure plan with supporting maps and data on the landowner. Childs, the Agency witness, testified that submission of a closure plan is Agency "policy" but is not contained in any rule or regulation. In the absence of the Board order, the City could place whatever final cover it deems sufficient on the site and then wait for the Agency to initiate enforcement proceedings. The burden would then be on the Agency to establish the inadequacy of the final cover. (Ill. Rev. Stat. 1975, ch. 111-1/2, par. 1031; Incinerator, Inc. v. Pollution Control Bd. (1974), 59 Ill. 2d 290, 319 N.E.2d 794; CPC International, Inc. v. Illinois Pollution Control Bd. (3d Dist. 1974); 24 Ill. App. 3d 203, 321 N.E.2d 58.) As an alternative, the City could apply for a variance from the Agency's final cover requirement.

Of primary importance is the fact that the complaint did not charge the City with violating cover requirements for solid waste

disposal sites or with failing to comply with closure regulations. In an enforcement proceeding, the respondent is entitled to notice of a specific violation charged against it and to notice of the specific conduct constituting the violation. (Draper & Kramer, Inc. v. Illinois Pollution Control Bd. (1st Dist. 1976), 40 Ill. App. 3d 918, 353 N.E.2d 106; Citizens Utilities Co. v. Illinois Pollution Control Bd. (2d Dist. 1972), 9 Ill. App. 3d 158, 289 N.E.2d 642.) The fact that the City introduced evidence regarding closure requirements did not cure the defect in this proceeding, and, as a reviewing court, we may consider only the evidence which was concerned with the violations charged in the complaint. (Fry Roofing Co. v. Pollution Control Bd. (1st Dist. 1974), 20 Ill. App. 3d 301, 314 N.E.2d 350.) The effect of the Board's order is to place on the City the burden of establishing that its closure procedures comply with Board regulations. However, the City is entitled to the benefit of a favorable burden of proof in enforcement proceedings (Citizens Utilities Co. v. Illinois Pollution Control Bd.), and the Board cannot shift that burden by ordering the City to show compliance with regulatory provisions which are outside the scope of the complaint.

A final issue is raised by the Agency's motion to strike from the record on appeal a letter from the Agency to the City, dated six weeks after the hearing, which mentioned that two feet of cover was required over the entire 25 acres. The letter was filed by the City in connection with a motion to stay the Board's order. This court has taken the motion with the case. Neither the Board nor a reviewing court can base a decision on matters which are not received in evidence. (North Shore San. Dist. v. Pollution Control Bd. (2d Dist. 1972), 2 Ill App. 3d 797, 277 N.E.2d 754.) We have not, therefore, considered the letter in reaching our decision, and obviously the Board did not rely upon the letter either. However, we believe the motion to strike should be denied because the letter was properly filed with the Board in the stay proceeding.

Accordingly, we affirm those parts of the order finding a permit violation, ordering the City to cease and desist disposal activities at the site, and ordering the City to close the site in conformity with the Board's Rules and Regulations. The remainder of the order requiring submission of a closure plan is reversed.

Affirmed in part; Reversed in part.

STOUDER and BARRY, JJ., concur.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of April, in the year of our Lord one thousand nine hundred and seventy-seven.


Clerk of the Appellate Court